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In the Supreme Court of the United States

OCTOBER TERM, 1931

EX PARTE: THE UNITED STATES, PETITIONER

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court is set out as Exhibit B (pp. 16–25) to the petition for a writ of mandamus. It is reported in 55 F. (2d) 960.

JURISDICTION

The jurisdiction of this Court is invoked under Sections 234 and 262 of the Judicial Code (U. S. C., Title 28, Secs. 342, 377).

QUESTION PRESENTED

Whether a District Judge may in his discretion refuse to issue a bench warrant for the arrest of a defendant named in an indictment, duly returned by a grand jury, which charges the defendant with

having committed an offense within the jurisdiction of the court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1014 of the Revised Statutes (U. S. C., Title 18, Sec. 591) provides as follows:

> For any crime or offense against the United States, the offender may, by any jus-

tice or judge of the United States, or by any commissioner of a circuit court to take bail,[1] or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

SUMMARY OF ARGUMENT

I. The fact that there was no preliminary examination prior to the return of the indictment is not a proper ground for the refusal of a bench

[1] The duties of commissioners of circuit courts, referred to in this section, were transferred to United States Commissioners by the Act of May 28, 1896, c. 252, Sec. 19, 29 Stat. 184.

warrant. Such examination is not required or made necessary either by the Fourth or Fifth Amendment. The return of the indictment is at least *prima facie* evidence of probable cause required by the Fourth Amendment.

II. Upon the return of an indictment, fair upon its face, the district court has no discretion to refuse to issue a bench warrant. The issuance of a bench warrant for the arrest of one against whom an indictment has been found is a ministerial and not a judicial act. In numerous cases this Court has issued writs of mandamus to lower Federal courts to compel the performance of ministerial acts.

III. Mandamus is the proper remedy. The United States can not appeal in a criminal case in the absence of specific statutory authority. There is no statute giving the United States authority to appeal either to this Court or to the Circuit Court of Appeals upon the refusal of a district judge to issue a bench warrant. Therefore mandamus is the only remedy.

ARGUMENT

It is difficult to tell from the opinion of the District Court just what the grounds are upon which its decision is based. We contend that, under the circumstances of this case, the issuance of a bench warrant was mandatory, and that mandamus is the proper remedy to correct the error committed by the District Court.

I

THE FACT THAT THERE WAS NO PRELIMINARY EXAMINATION PRIOR TO THE RETURN OF THE INDICTMENT IS NOT A PROPER GROUND FOR THE REFUSAL OF A BENCH WARRANT

The District Court concedes in its opinion (Exhibit B, p. 22 of the petition) that the accused had no right to a preliminary examination, citing *United States* v. *Thompson*, 251 U. S. 407. Nevertheless the court states (pet. p. 21) that—

> The instant case has been chosen merely because it was a case in which no preliminary inquiry has been made, but in which there was no special reason one should not be made.

A preliminary examination prior to the return of an indictment is not required or necessary.[2] The Constitution does not require any preliminary hearing. Fifth Amendment (*supra*, p. 2); see *Hughes* v. *Gault*, 271 U. S. 142, 149. The finding of an indictment without a sworn charge previously made is legal, and "it is settled that such a charge is unnecessary." *Ruthenberg* v. *United States*, 245

[2] The authorities so holding are unanimous and include at least two cases in the Eastern District of Pennsylvania. *United States* v. *Reilly*, 30 F. (2d) 866 (E. D. Pa.); *United States* v. *Averett*, 26 F. (2d) 676 (W. D. Va.); *Van Dam* v. *United States*, 23 F. (2d) 235 (C. C. A. 6th); *Roth* v. *United States*, 294 Fed. 475 (C. C. A. 6th); *United States* v. *Kerr*, 159 Fed. 185 (E. D. Pa.); *United States* v. *Fuers*, Fed. Cas. No. 15174 (W. D. Pa.). See *Goldsby* v. *United States*, 160 U. S. 70, 73; *United States* v. *Kilpatrick*, 16 Fed. 765, 770–771 (W. D. N. C.). Compare *United States* v. *Jenks*, 258 Fed. 763 (E. D. Pa.).

U. S. 480, 482–483; *Hale* v. *Henkel,* 201 U. S. 43, 59–60. The practice of requiring a preliminary examination of a criminal complaint was the English practice, and it has been adopted in some of the States of the Union, for example, Pennsylvania and North Carolina. See *Hale* v. *Henkel, supra,* at pp. 64–65. But the English practice is not followed by nor binding upon the United States courts. *United States* v. *Thompson,* 251 U. S. 407; *Hale* v. *Henkel, supra; United States* v. *Kerr,* 159 Fed. 185 (E. D. Pa.).

The Fourth Amendment (*supra,* p. 2) provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." But the return of an indictment is at least *prima facie* evidence of probable cause. *Hyde* v. *Shine,* 199 U. S. 62, 84; *Price* v. *Henkel,* 216 U. S. 488, 492–493; *Fetters* v. *United States,* 283 U. S. 638. The requirement that the warrant shall be supported by oath or affirmation is fully met by the fact that both the grand jurors and the witnesses are sworn before the witnesses are heard.

II

UPON THE RETURN OF AN INDICTMENT, FAIR UPON ITS FACE, THE DISTRICT COURT HAS NO DISCRETION TO REFUSE TO ISSUE A BENCH WARRANT

It is the duty of the officers of the Government to prosecute crime, and performance of this duty in the absence of abuse is not subject to judicial control. The "absolute right of the United States

to prosecute" can not be thwarted "by the application of unauthorized judicial discretion." *United States* v. *Thompson,* 251 U. S. 407, 412–413. In *Ex parte United States,* 242 U. S. 27, 42, this Court held that the judicial power did not embrace "a discretionary authority to permanently refuse to try a criminal charge." These words describe the present situation exactly. Unless the accused comes into court voluntarily (which is not at all probable), the court's refusal to issue a bench warrant amounts to a permanent refusal to try the criminal charge. In the language of this Court in *United States* v. *Thompson,* 251 U. S. 407, 415—

> the assertion of the judicial discretion which was the basis of the judgment below is incompatible with the spirit and purpose underlying the admitted principles as to the power of grand juries, and the right of the Government to initiate prosecutions for crime, since in the case stated such powers are controlled, not by a rule of law, but depend upon a mere exercise of judicial discretion.

The act of issuing a bench warrant to apprehend a defendant named in an indictment is purely ministerial.[3] The warrant is the process by which

[3] No authorities have been found in the federal courts directly sustaining this proposition, presumably because the occasion to consider the question has never arisen. Two state courts have held the issuance of a bench warrant is a ministerial act, and that the court has no discretion to refuse it. *In re Davis,* 107 N. J. Eq. 160, 175, 178; *State* v. *Gordon,* 18 La. Ann. 528.

the defendant is brought before the court for arraignment upon the indictment, upon which no proceedings may be had until the defendant is arraigned. The act of issuing process determines nothing, and is no more judicial than the issuance of a summons in a civil suit or a subpœna for the attendance of a witness. Given an indictment fair upon its face, and duly returned by the grand jury, the issuance of the warrant is but a ministerial step in the process by which the validity of the indictment and the guilt or innocence of the defendant may be judicially determined. The refusal of process was in effect a refusal to proceed at all. From the decisions of this Court it may be deduced that, such an act is not discretionary but ministerial and mandatory. Thus in *Insurance Company* v. *Wilson,* 8 Pet. 291, 304, where a judge refused to sign a judgment rendered by his predecessor who had died, this Court said:

> The act of signing the judgment is a ministerial and not a judicial act.

In numerous cases this Court has issued writs of mandamus to lower federal courts to compel the performance of ministerial acts. *United States* v. *Peters,* 5 Cranch, 115; *Ex parte Milwaukee Railroad Co.,* 5 Wall. 825; *Hudson* v. *Parker,* 156 U. S. 277; *Ex parte United States,* 242 U. S. 27; *Ex parte Simons,* 247 U. S. 231. See also *Ex parte Many,* 14 How. 24; *Insurance Company* v. *Comstock,* 16 Wall. 258; *Ex parte Buder,* 271 U. S. 461.

III

MANDAMUS IS THE PROPER REMEDY

The United States can not appeal in a criminal case, in the absence of specific statutory authority. In *United States* v. *Sanges,* 144 U. S. 310, this Court held that the United States could not take out a writ of error from a decision of a District Court sustaining a demurrer to an indictment. Specific authority to appeal in such cases was granted to the United States by the Criminal Appeals Act (Act of March 2, 1907, c. 2564, 34 Stat. 1246; U. S. C., Title 18, Sec. 682). In *United States* v. *Dickinson,* 213 U. S. 92, this Court dismissed for want of jurisdiction a writ of certiorari which had been granted in a criminal case on the petition of the United States. Thereafter authority to file petitions for certiorari was specifically granted to the United States by Section 240 of the Judicial Code. But there is no statute giving the United States authority to appeal from the refusal of a District judge to issue a bench warrant.[4] Therefore even if the refusal to issue a bench warrant were a "final decision" within the meaning of Sec-

[4] In *United States* v. *Murray,* 275 U. S. 347, and *United States* v. *Benz,* 282 U. S. 304, the United States did appeal to the Circuit Court of Appeals from orders in criminal cases which do not seem to have been within the scope of any statute authorizing the United States to appeal. No question was raised in either case as to the jurisdiction of the Circuit Court of Appeals.

tion 128 of the Judicial Code, the United States could not appeal to the Circuit Court of Appeals. Consequently mandamus is the only remedy. In the language of this Court in *Insurance Company* v. *Wilson,* 8 Pet. 291, 303:

> it is the only adequate mode of relief, where an inferior tribunal refuses to act upon a subject brought properly before it.

CONCLUSION

The writ of mandamus should issue as prayed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 19, Original

EX PARTE: THE UNITED STATES, PETITIONER.

RETURN TO RULE TO SHOW CAUSE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 19, Original

EX PARTE: THE UNITED STATES, PETITIONER.

ANSWER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA AND OF THE HON. OLIVER B. DICKINSON, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, TO THE PETITION OF THE UNITED STATES, BY ITS SOLICITOR GENERAL, FOR A WRIT OF MANDAMUS.

And now come the United States District Court for the Eastern District of Pennsylvania, and the Honorable Oliver B. Dickinson, respondents to the petition for a writ of mandamus filed by the United States by its Solicitor General, and make return to the said petition and to the rule to show cause granted thereon as follows:

1. Respondents admit that on the 10th day of March, 1932, a Grand Jury of the United States, law-

fully summoned in the Eastern District of the State of Pennsylvania, presented an indictment against one, Joseph V. Wingert, charging him in four counts with certain violations of the banking laws of the United States, a copy of which indictment is attached to the petition for mandamus.

2. Respondents admit that the counts in said indictment charged the said defendant with unlawfully and feloniously embezzling certain sums of money from North City Trust Co. of Pennsylvania, a member of the Federal Reserve Bank of Philadelphia, with intent to injure and defraud the said bank.

3. Respondents admit that on March 22, 1932, the United States Attorney for the Eastern District of Pennsylvania, presented to the Court a written petition praying that a bench warrant for the apprehension and arrest of Joseph V. Wingert; and that after consideration thereof the District Court, on March 22, 1932, denied the petition, and declined to issue a bench warrant for the arrest of Wingert.

4. Respondents admit that a copy of the indictment and petition for the bench warrant, and order thereon, are attached to the petition for a mandamus as Exhibit A; and that a copy of the opinion of the United States District Court is attached thereto as Exhibit B.

5. Respondents deny the action of the United States District Court for the Eastern District of Pennsylvania, in denying the motion for the issuance of the bench warrant, was without warrant of law as charged in the petition for mandamus; and aver, on the con-

trary, that said action was a matter within the judicial discretion of the United States District Court, and therefore not subject to mandamus proceedings.

WHEREFORE respondents pray that the petition and rule to show cause why writ of mandamus should not issue be discharged; and that respondents be dismissed with costs.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA,
By O. B. DICKINSON,
Judge.

O. B. DICKINSON,
United States District Judge for
the Eastern District of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

Oliver B. Dickinson being duly sworn according to law deposes and says that he is Judge of the United States District Court for the Eastern District of Pennsylvania, and that the facts set forth in the within answer are true and correct to the best of his knowledge, information and belief.

O. B. DICKINSON.

Sworn and subscribed to before me this 31st day of August, 1932.

[SEAL.] GEORGE BRODBECK,
Clerk U. S. District Court,
Eastern District of Pennsylvania.